FILED

Supreme

No. 149.

CLAIR CONRAD (Plaintiff-Appellee in the Court

v.

PENNSYLVANIA RAILROAD COMPANY, (Defendant-Appellee in the Court below),

Respondent.

No. 150.

PASQUALE DAMIANO (Plaintiff-Appellee in the Court below),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY, (Defendant-Appellee in the Court below),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Philip Price,
Hugh B. Cox,
John R. Wall,
Barnes, Dechert, Price, Smith & Clark,
12th Floor Packard Building,
Philadelphia 2, Pennsylvania,
Attorneys for Respondent.

International, 20 Chestnut St., Phila. 6, Pa.

INDEX TO BRIEF.

TABLE OF CASES CITED.

TABLE OF AUTHORITIES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1947.

No. 149.

CLAIR CONRAD (PLAINTIFF-APPELLANT IN THE COURT BELOW),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY (DEFENDANT-APPELLEE IN THE COURT BELOW),

Respondent.

No. 150.

PASQUALE DAMIANO (PLAINTIFF-APPELLANT IN THE COURT BELOW),

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY (DEFENDANT-APPELLEE IN THE COURT BELOW),

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Third Circuit (Conrad R. 12) is reported in 161 F. (2d) 534. The opinion of the District Court (Conrad R. 7a) is not reported.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347).

Question Presented.

In each of these cases the petitioner instituted a suit in the United States District Court under the Federal Employers' Liability Act on an alleged cause of action that admittedly accrued more than three years before the date upon which the action was instituted. The question presented in each case is whether the prior execution by the petitioner of a voluntary compensation agreement under the provisions of the Pennsylvania Workmen's Compensation Act, which does not require proof of negligence, and the receipt by petitioner of payments under the agreement, suspended or tolled the operation of Section 6 of the Federal Employers' Liability Act which provides that no action shall be maintained under the statute unless commenced within three years from the day the cause of action accrued.

Statute Involved.

Section 6 of the Federal Employers' Liability Act provides (45 U. S. C. 56):

> "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." • • •

Statement.

The petitioner, Conrad, brought a suit in the United States District Court for the Eastern District of Pennsylvania on June 12, 1946 under the Federal Employers' Liability Act to recover for injuries alleged to have been incurred on October 12, 1941 while the petitioner was in the employ of the respondent.

Petitioner, Damiano, brought a similar suit in the same court on May 16, 1946 under the Federal Employers' Liability Act to recover for injuries alleged to have been incurred on November 4, 1942 while the petitioner was in the employ of the respondent.

Neither petitioner instituted adverse proceedings under the Pennsylvania Workmen's Compensation Act, but each petitioner, some time within a year from the date on which his injuries occurred, executed a separate agreement with the respondent for payment of compensation. Copies of these agreements were never produced or incorporated in the record. Two months after respondent's motion to dismiss had been filed an ex parte affidavit of petitioner Conrad (Conrad R. 5a), containing statements with respect to his agreement, was filed with the District Court. Two weeks after respondent's motion to dismiss had been filed an ex parte question and answer statement of petitioner Damiano (Damiano R. 6a), referring to his agreement, was filed with the District Court.

Both cases were heard by the District Court and the Circuit Court of Appeals on the theory that the compensation agreements were made under, and in compliance with, the Pennsylvania Workmen's Compensation Act.

Payments were made by respondent to petitioner Conrad for an unstated period. The respondent also made payments to petitioner Damiano until after he brought suit under the Federal Employers' Liability Act. It may be assumed that these payments were made under the compensation agreements although this fact is not affirmatively shown by the record.

In his complaint, the petitioner, Damiano, alleged in the alternative that he was induced to enter into the compensation agreement "either fraudulently or by a mutual mistake of fact." The petitioner, Conrad, made no such allegation and in his case the issue of fraud was never raised in the courts below.

In the District Court the respondent moved to dismiss each suit on the ground that it had been commenced more than three years after the cause of the action accrued. The District Court granted the motion in both cases and its judgments were affirmed by the Circuit Court of Appeals for the Third Circuit.

ARGUMENT.

I. The Petitioners' Right to Sue Under the Federal Employers' Liability Act Has Been Extinguished by Section 6 of the Act.

In each of the cases presented, the petitioner's right of action arose under the provisions of the Federal Employers' Liability Act, c. 149 of the Act of April 22, 1908, 35 Stat. 65, as amended, (45 U. S. C. A. § 51 et seq.), more than three years before any suit was started.

Section 6 of the Act (45 U. S. C. A. § 56) provides that

> "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

It is submitted that the District Court was correct in dismissing these complaints on the ground that the requirement of Section 6 is more than a mere statute of limitations pertaining to the remedy and that compliance with this requirement is a condition precedent to the employee's right of action. As briefly stated by Mr. Justice Holmes in *Flynn v. N. Y., N. H. & H. R. R. Co.*, 283 U. S. 53, 56 (1931):

> "The running of the two years from the time when his cause of action accrued extinguishes it as effectively as a release, *Engel v. Davenport*, 271 U. S. 33, 38, and the same consequence follows."

In *Engel v. Davenport et al.*, 271 U. S. 33, 38 (1926), in referring to Section 6, the Court said:

> "This provision is one of substantive right, setting a limit to the existence of the obligation which the Act creates."

Neither fraud nor other circumstances which might toll an ordinary statute of limitations is applicable. *Bell v. Wabash Ry. Co.*, 58 F. (2d) 569 (C. C. A. 8th 1932). Nor

does the fact that the cases here cited deal with the two year limitation imposed by Section 6 prior to the 1939 amendment weaken in any way their authority for the principle stated.

Thus lapse of time itself destroys any liability of the employer, since commencement of an action within the three year period prescribed by the act is a prerequisite to the exercise of any rights under the act, and constitutes a limitation of such rights. The Federal Employers' Liability Act established a new right in derogation of the common law and thus created nothing which could extend in time beyond the period of its own express limitation. As was said by Chief Justice Waite in *The Harrisburg,* 119 U. S. 199, 214 (1886), when speaking of a state act granting a right to bring actions for loss of life within one year thereof:

> "The statutes create a new legal liability, with a right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all."

It is therefore misleading and erroneous to say, as petitioners do on pages 16 and 17 of their brief, that the execution of workmen's compensation agreements under state law "tolled" the statute of limitations. As above indicated, the express limitation imposed by Section 6 cannot be "tolled" even on account of fraud or other circumstances which might toll an ordinary statute of limitations. *Bell v. Wabash Ry. Co.,* 58 F. (2d) 569 (C. C. A. 8th 1932), supra, and compare *Pollen v. Ford Instrument Co. Inc.,* 108 F. (2d) 762, 763 (C. C. A. 2nd 1940) and *U. S. ex rel. Nitkey v. Dawes,* 151 F. (2d) 639, 644 (C. C. A. 7th 1945), cert. den. 327 U. S. 788 (1945). Unless each action was "commenced

within three years from the day the cause of action accrued", any right given petitioners by the Federal Employers' Liability Act to sue for the injuries now complained of simply ceased to exist; and since both actions now before the Court were brought more than three years after the respective causes of action accrued, the District Court could not properly have done otherwise than grant respondent's motions to dismiss.

II. The Voluntary Compensation Agreements Do Not Suspend the Operation of Section 6.

The voluntary compensation agreements entered into between the respective petitioners and respondent, even if made in strict conformity with the applicable Pennsylvania law, did not constitute the commencement of an action under the Federal Employers' Liability Act, or the commencement of any action which might later be transformed into an action under the Federal Employers' Liability Act.

In their statement of Questions Presented, petitioners have assumed that the agreements referred to in Conrad's affidavit and in Damiano's sworn statement not only were compensation agreements entered into under the Pennsylvania Workmen's Compensation Act but also were approved by the Pennsylvania Workmen's Compensation Board, and have so stated on page 16 of their brief. There is nothing in the record, however, to show that either is true. No copies of the agreements in question were ever produced or otherwise incorporated in the record and there is nothing to show any of the terms of the agreements or that the payments referred to were actually made under them. However, respondent is willing to accept, for the purposes of this argument, petitioners' assumption that the agreements were entered into in strict accordance with the provisions of the state workmen's compensation law, that they were approved by the Board and that the payments to the petitioners were made thereunder. It is clear, however, that

the execution of such agreements could not possibly constitute the commencement of actions under the Federal Employers' Liability Act nor could they be "amended" in any way so as to permit original complaints, based upon causes of action under that act and filed after the statutory period had run, to relate back to the dates when the agreements were executed and make those the dates when the respective actions were first commenced.

Petitioners seek to avoid the effect of Section 6 first by invoking the aid of a number of cases which have held that a plaintiff who had filed his complaint within the statutory period either in a State Court or in a Federal Court whose jurisdiction was based solely upon diversity of citizenship, could amend, after that period had passed, to plead employment in interstate commerce and thus bring himself within the coverage of the federal act, and secondly by extending the recent holding of this court in *Herb v. Pitcairn,* 325 U. S. 77 (1945), to apply to the facts of the present case.

The cases cited by petitioners on this point are not controlling here for two reasons. In the first place, each of those cases was concerned with an *amendment* of an original complaint which had been filed within the statutory period in a court of jurisdiction competent to render a final judgment in an action under the Federal Employers' Liability Act, except the case of *Herb. v. Pitcairn,* 325 U. S. 77, which, under the state practice, could be and was transferred to such a court. In the cases at bar there is no suggestion that the so-called compensation agreements might be *amended* to state a cause of action against the railroad under the federal act or under any other act. The complaints here involved are not and do not purport to be amendments. They are the means by which new actions were commenced by new processes, on new causes of action, in an entirely new forum, and well beyond the three-year period permitted by the act.

Secondly, the cases relied on by petitioners involved an original complaint which charged the defendant with negligent action as the basis of liability, so that the subsequent amendment asserting the same right of recovery under federal instead of state law was considered to be a change merely of form and not of substance, and therefore not the introduction of a new cause of action. In the *Kinney* case, cited on page 10 of petitioners' brief, the New York Supreme Court put the basic reason for its ruling in the following words (162 N. Y. S. 42, 47):

> "In the case at bar the action was commenced concededly within two years after it accrued. Action was, therefore, brought *on the basic cause of action for negligence,* and the only cause of action that the plaintiff ever had." (Emphasis supplied.)

The other cases cited are essentially to the same effect. See *Seaboard Airline Railway v. Renn,* 241 U. S. 290, 294 (1916).

The distinction between such cases and each of the present ones is obvious when one considers the nature of the Pennsylvania Workmen's Compensation Act. The general section covering acceptance of the act provides that, where employee and employer agree to elective compensation, "compensation for personal injury to, or for the death of such employe, by an accident, in the course of his employment, shall be paid in all cases by the employer, *without regard to negligence,* according to" a schedule of values fixed by the act. Laws of Pennsylvania, Act of June 2, 1915, P. L. 736, Art. III, Par. 301, as amended (77 Purdon's Statutes 431). (Emphasis supplied.) The execution and filing of a voluntary compensation agreement between an employee and an employer is an admission only that an injury was sustained by the employee in the course of his employment. The agreements in the present cases can mean no more nor have any greater significance or effect. The respondent here may have admitted obligations under the Pennsylvania Workmen's Compensation Act, but cer-

tainly it cannot be said to have admitted any liability, or even the existence of any claim for liability, *based upon negligence,* since none was charged. In fact, that element had been excluded by the provisions of the Pennsylvania act.

The execution of a voluntary compensation agreement under the provisions of the Workmen's Compensation Act of Pennsylvania cannot possibly constitute the commencement of an action or suit of any kind, and most particularly not one based upon the employer's negligence, nor can such an agreement be amended in any way by a later complaint in another forum which states a cause of action *only* because of respondent's alleged negligence. In the present cases the respondent was never put upon notice that it was charged with negligent conduct, so that it might have had a reasonable opportunity to investigate the facts before more than three years had elapsed, and the general statements, made on page 18 of petitioners' brief, with reference to investigations made of accidents, not only have no support in the record but, in respect of compensation cases, are absolutely untrue.

In *New York Central R. R. v. Kinney,* relied upon by petitioners, it is apparent from the portion of the opinion quoted on page 17 of their brief that the Court felt that Section 6 was inapplicable because (260 U. S. 340, 346):

> "defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it *because of specified conduct,* . . ." (Emphasis supplied.)

Also on page 17 of the petitioners' brief appears a serious misstatement, which, however, indicates the fundamental misconception which is the basis of petitioners' argument. It is there stated that in the *Kinney* case and in the two cases now before the Court, "the original theory of his suit was the same." In the *Kinney* case, both the original and the final theory was negligent conduct on the part of the defendant. In the present cases, the original

theory was not negligent conduct on the part of the respondent, but merely an accident in the course of employment without regard to petitioner's negligence. In other words, "specified conduct" was not involved. The present theory, however, is negligent conduct of the respondent and no negligence on the part of the petitioners. State law was not a "theory of the suit" in either case. State law merely provided the remedy, which was entirely adequate if properly invoked. Thus the petitioners' argument completely overlooks the distinction between the railroad company's liability for negligence under the Federal Employers' Liability Act and the absolute liability under Workmen's Compensation Acts, which was recently noticed by this Court in the case of *Myers v. Reading Co.*, 67 S. Ct. 1334,—U. S.—(1947).

In *Tiller v. Atlantic Coastline Railroad Co.*, also relied on by petitioners, the Court found no reason for applying a statute of limitations for the purpose of barring a proposed amendment, where the defendant had "had notice from the beginning that petitioner was trying to enforce a claim against it *because of events leading up to*" the death of plaintiff's decedent. 323 U. S. 574, 581. (Emphasis supplied.) In the present cases, the compensation agreements gave respondent no warning or notice whatsoever that it would be subsequently charged with liability for negligent conduct. Nor could they, by any stretch of the imagination, be considered as commencing a proceeding in a forum competent to entertain and adjudicate a claim under the Federal Employers' Liability Act.

It is, moreover, idle for petitioners to assert that it is a mere fortuitous circumstance that a different state forum was provided for Kinney than Pennsylvania provided for petitioners, or that they did as much by merely signing a voluntary compensation agreement as Kinney did by bringing a suit in a court of general jurisdiction. Kinney was seeking to collect as much as a jury would give him in an action based on a claim of negligent conduct. The peti-

tioners made no assertion of negligence, nor did they allege any fault on the part of respondent, and were seeking merely the compensation allowed them by the state act. Actually, they did not even initiate a proceeding before the Workmen's Compensation Board but, under the assumed facts, merely entered into voluntary agreements as authorized by the Workmen's Compensation Act to avoid the necessity of filing a claim petition or otherwise initiating proceedings under that act. It would have been no different, however, if they had filed petitions in adverse proceedings under the State Compensation Act, since, as admitted by petitioners on page 6 of their brief, there is no way in which a proceeding commenced in Pennsylvania under the Workmen's Compensation Act can be transferred for any purpose to any other court.

Herb v. Pitcairn, 325 U. S. 77 (1945), is likewise not controlling here. This is apparent from the language of the Court at page 78.

> ". . . An action is 'commenced' for these purposes as a matter of federal law when instituted by service of process issued out of a state court, even if one which itself is unable to proceed to judgment, if the state law or practice directs or permits the transfer through change of venue or otherwise to a court which does have jurisdiction to hear, try and otherwise determine that cause. Whether the action would be barred if state law made new or supplemental process necessary is a question not involved here and not decided. . . ."

In the present cases, there has never been any process of any kind, but merely agreements for compensation entered into without any proceedings at all. However, petitioners would be in no better position if they had instituted proceedings under the State Compensation Act and their right to compensation had been resisted by respondent. If, after the three year period had expired, the petitioners had decided, as they did here, to claim a right to recover under the Federal Employers' Liability Act be-

cause of the respondent's negligence and had applied to the State Compensation Board to transfer the proceedings to a state or a federal court, the State Board would have had no power to do so. Here there was not even a pretense of a transfer, but the initiation of an entirely new suit in the federal court without reference to the prior compensation agreements, and also without reference to any prior proceedings before the Compensation Board, because there were none. If there had been such proceedings, they could no more have been transferred to the District Court and been metamorphosed into a suit under the Federal Employers' Liability Act than could a proceeding of any kind in the District Court have been transferred to the State Compensation Board and become there a proceeding under the State Compensation Act, whatever it may have been called when commenced in the District Court.

It is not true, as stated on pages 9 and 20 of petitioners' brief, that proceedings "in any tribunal" may be considered the commencement of an action under which a claim under the Federal Employers' Liability Act may be asserted. In Pennsylvania, an action commenced before a magistrate or a justice of the peace cannot be transferred to another competent tribunal, if the magistrate or justice of the peace is found not to have jurisdiction. See *Deihm v. Snell,* 119 Pa. 316, 13 Atl. 283 (1888), and *Birkhead v. Ward,* 35 Pa. Super. Ct. 235 (1908). Similarly, the State Compensation Board could not entertain a proceeding based on any ground not furnished by the State Compensation Act, nor could it transfer any such action to any other tribunal. As in the federal courts, a suit of which the tribunal has no jurisdiction must be dimsissed, *Hegler v. Faulkner,* 127 U. S. 482 (1888), in the absence of specific statutory authority for its transfer to another forum. There is therefore no foundation whatever for the petitioners' argument that the mere execution of a compensation agreement, in accordance with the provisions of the state act, gave the petitioners the right to ignore the three year lim-

itation in the Federal Employers' Liability Act, and bring a new suit in the federal court after that period had expired.

On page 16 of their brief, petitioners seem to argue that the one year period of limitation under the state compensation act may in some fashion be incorporated in the Federal Employers' Liability Act, so as to permit a suit under the latter act within one year after the payment of compensation under the state act, no matter how many years may have elapsed since the accrual of the cause of action. It is believed that such an argument requires no answer.

Apparently in order to make their cases appear as if there had been adverse proceedings initiated under the state compensation act, petitioners devote several pages of their brief to an attempt to show that the appellate courts of Pennsylvania did not mean what they said in *Gairt v. Curry Coal Min. Co.*, 272 Pa. 494, 116 Atl. 382 (1922), and in *Virtue v. J. Lee Plumber, Inc.*, 111 Pa. Super. Ct. 476, 170 Atl. 443 (1934), to the effect that workmen's compensation proceedings are not litigation. Whether they are or not, they clearly are not such litigation as can be transformed into a suit in the federal court under the Federal Employers' Liability Act, even if such a course had been attempted by the petitioners instead of that, which they actually followed, of ignoring all that had gone before and commencing an entirely new action in the federal court.

III. Section 5 of the Federal Employers' Liability Act Has No Application to the Present Case.

Section 5 of the Federal Employers' Liability Act provides (45 U. S. C. A. 55):

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void." • • •

The Section has no application in the present case even if it be assumed, as petitioners have suggested, that the respondent entered into the agreements with intent to avoid its obligations under the Federal statute. The respondent is not relying upon the compensation agreements as a bar to petitioners' actions. The respondent contends that the petitioners cannot maintain these actions because they were not commenced within three years from the day the causes of action accrued. It is the petitioners, and not the respondent, who have brought the agreements into the case by arguing that the agreements should be regarded as if they in effect commenced this action. In this respect, these cases are different from *Duncan v. Thompson*, 315 U. S. 1, cited by petitioners. In that case the defendant railroad relied upon the agreement as a bar to an action for personal injuries.

As the Circuit Court of Appeals pointed out, 161 F. (2d) 534, 537, if it should be assumed that the provisions of Section 5 are applicable to the compensation agreements, the only possible consequence would be to make the agreements void. Section 5 does not purport to limit or to qualify in any way the force or effect of Section 6. Section 5, therefore, cannot revive petitioners' alleged rights of action under the Federal Employers' Liability Act. Those rights have long since been extinguished because of the failure of petitioners to bring their actions within three years of the date on which the alleged cause of action accrued. The fallacy of the petitioners' arguments with respect to Section 5 appears from the fact that compensation agreements do not purport to affect in any way the petitioners' rights under the Federal Employers' Liability Act. Without in any way violating the compensation agreements, petitioners could at any time within the three year period have brought their actions under the Federal statute. There was nothing in the compensation agreements which enabled the respondent to exempt itself from liability under the Federal statute. Respondent's liability under that

statute remained unaffected until it expired three years after the alleged causes of action had accrued.

The allegations of the pleadings do not support the arguments with respect to fraud that are made in the petitioners' brief. In his complaint, petitioner Conrad did not allege that he had been induced to enter into the compensation agreement by fraud and, accordingly, the issue of fraud cannot be raised in that case. In his complaint, petitioner Damiano alleged that he had been induced to enter into the agreement by the defendant "either fraudulently or by a mutual mistake of fact." Apart from the question of the technical sufficiency of this form of pleading, the fact that the allegation is made in the alternative suggests that the emphasis now given to the allegation of fraud is an afterthought. Even if pleading in the alternative form is permissible, the general allegation of fraud, unsupported by any specific allegations to give it content, is not adequate to support the arguments now made in the petitioners' brief.

Petitioners and their present counsel are fully aware that in 1941, when these compensation agreements were voluntarily executed, not only the respondent, but petitioners, their union advisors and attorneys were uncertain whether employment such as that in which petitioners were engaged would be held to be interstate in character, so as to afford petitioners the benefit of the Federal Employers' Liability Act.

Furthermore, even had the respondent suspected or known that petitioners were entitled to sue under the Federal act, it was under no duty to give them legal advice, nor can its failure to impart any knowledge or opinion that it may have had, excuse petitioners' failure to comply with the specific requirement of Section 6 of the act. See *Bell v. Wabash Ry. Co.,* 58 F. (2d) 569, supra; *Wichita Falls and So. R. R. Co. v. Durham,* 132 Tex. 143, 120 S. W. 2d 803 (Tex. 1938).

Conclusion.

It is respectfully submitted, therefore, that the petitions for certiorari should be denied.

Respectfully submitted,

PHILIP PRICE,
HUGH B. COX,
JOHN R. WALL,
Attorneys for Respondent.